No. 14,516

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES ARENA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction is invoked under Sections 1621 and 3231 of Title 18 United States Code, and Sections 1291 and 1294(1) of Title 28 United States Code.

STATEMENT OF THE CASE.

Appellant was indicted on June 3, 1953, for perjury committed before the grand jury on May 6, 1953 (Tr. 3-7). The case was tried by a jury before

United States District Judge Edward P. Murphy (Tr. 48). The foreman of the grand jury, Charles St. John, testified that appellant appeared before the grand jury in connection with an income tax evasion investigation concerning Mr. Samish and Mr. Flynn (Tr. 50). Mr. St. John administered an oath to appellant that he would testify to the truth, the whole truth and nothing but the truth (Tr. 51). The particular type of income that the grand jury was investigating at the time appellant testified was the gambling income of Mr. Samish and Mr. Flynn (Tr. 51). A portion of the transcript of the grand jury proceedings on May 6, 1953, was read into the record (Tr. 58). It was stipulated that appellant's testimony was material to the proceedings before the grand jury (Tr. 64). Appellant testified before the grand jury that he knew Irving Baskin and Tiny Heller (Tr. 70). He said that he had placed very small bets with Mr. Heller amounting to twenty or thirty dollars (Tr. 71) and that he had not won more than one hundred dollars (Tr. 72). The testimony alleged to be false in the indictment was read into the record (Tr. 73-75). This testimony was as follows:

> "Q. (By Mr. Olney.) I see. On this occasion Mr. Baskin says you accompanied him to the bank while he proceeded to cash some checks in return for which there were 38 one thousand dollars bills which were obtained from the bank, and that the teller counted that $38,000 out in your presence to him and he in turn counted the $38,000 in these one thousand dollars bills to you and give you the bills.

A. I didn't get them, sir.

Q. Did that happen?

A. No sir.

Q. Anything like it?

A. No sir.

Q. Did you ever go there to the bank with this Baskins?

A. No, but I was in that bank most every single day in my own business. I have seen and been in there dozens of times, I will say, but I am always in that bank every single day ever since I had my liquor business, that is where I used to bank.

Q. Has Mr. Baskin ever delivered any money to you?

A. No sir.

Q. Even one cent?

A. Never had occasion to.

Q. (By Mr. Burke.) Your testimony is that on no occasion did anyone ever pay you any amount of money, one dollar or $38,000 to be delivered to you personally as your own money or on behalf of Mr. Samish or anyone else?

A. That's correct, Mr. Burke.

Q. (By the Foreman.) Did you ever do any business with Mr. Baskin or have any transaction with Mr. Baskin in any bank in Oakland?

A. I did not, sir.

Q. And you never received $38,000 from Mr. Baskin?

A. No sir."

Irving Baskin testified that he had known the appellant since approximately 1941 or 1942 (Tr. 77). He had done accounting work for Tiny Heller dur-

ing the years 1946 and 1947 (Tr. 78, 81). Mr. Heller's occupation during those years was that of a betting commissioner or a person who takes wagers (Tr. 78). His betting commission office was in back of a liquor store (Tr. 80). Irving Baskin, the witness, was familiar with Mr. Heller's handwriting and testified that U. S. Exhibits 2, 3, 4, 5, 6, 7, 8 and 9 were in Heller's handwriting (Tr. 83-88). Baskin also testified to the manner in which these records were kept (Tr. 82-87). He said Exhibit No. 2 was a running account of bets made during the day (Tr. 82), that Exhibit No. 3 was the kind of record on which Heller jotted down bets as they came over the telephone (Tr. 83), that Exhibit Nos. 4 and 5 were books of Heller's check stubs (Tr. 84-85), and that Exhibit Nos. 6, 7 and 8 were checks in Heller's handwriting dated October 28, 1946, October 30, 1946, and December 3, 1947, respectively (Tr. 86-87). Appellant was in the Heller establishment near the end of Mr. Heller's operation three or four times a week (Tr. 88). The witness on several occasions delivered envelopes to appellant at his liquor store (Tr. 89). In early December, 1947, Baskin testified that Tiny Heller, in appellant's presence, gave him checks and told him to "get them cashed into one thousand dollar bills and then give them to Jimmy." (Tr. 90-91). The total amount of these checks was $38,000 (Tr. 92). Appellant and Baskin then left the Heller establishment and went to the Bank of America approximately two blocks away (Tr. 92). Baskin then went to the window of the teller, Herman Worth, and re-

ceived 38 one thousand dollar bills for the checks (Tr. 93-94). The Chief Clerk, Earl Madieros, okayed the checks (Tr. 94). Baskin then counted the money over to appellant and appellant "took the money" and "put it in his pocket." (Tr. 95-96). Baskin testified that the transaction was completed by approximately 12:30 (Tr. 96).

F. W. Whitted was employed from April, 1941, in Tiny Heller's gambling establishment until Tiny Heller went out of business (Tr. 100, 103). Part of his duties was determining the odds on particular sporting events (Tr. 101). Appellant was in the gambling establishment five or six times a week for several years according to Mr. Whitted (Tr. 102). In 1946 and 1947 the witness observed Mr. Arena making large bets from one hundred to two or three thousand dollars (Tr. 105). Whitted recorded some of these bets (Tr. 106). U. S. Exhibit No. 10 reflected a bet recorded by Whitted for appellant (Tr. 108). This bet resulted in a win of $7,900 (Tr. 125). This transaction occurred on October 26, 1946 (Tr. 109). Mr. Heller testified that this bet was made by Mr. Arena but on behalf of Mr. Samish (Tr. 131). U. S. Exhibit No. 2 showed a winning bet of $4,050 to the "S.A." account. U. S. Exhibit No. 4 contains check stub, #1253, for $11,950 dated October 28, 1946, made payable to cash, for the "S.A." account with $4,050 as one of the items listed under remarks and $7,900 listed as the other. U. S. Exhibit No. 6 is a check, numbered identically with the check stub (Ex. 4), made out to cash for $11,950, dated October 28, 1946.

These exhibits, taken together, reflect a bet made by appellant which resulted in payment on behalf of the "S.A." or Samish-Arena account. According to Mr. Whitted, Jimmy Arena placed all bets for Arthur Samish (Tr. 120-121). Previously when Samish placed the bets himself, his bets were recorded under the initials "A.S.". When Mr. Arena placed the bets they were recorded as "S.A." (Tr. 121). Whitted testified that appellant had made a bet for himself with Mr. Whitted at the Heller establishment which reflected a win of $2,000 (U. S. Exhibit No. 9, Tr. 114, 115). Whitted also identified Heller's handwriting on U. S. Exhibit Nos. 2, 3 and 10, and testified that these records were kept in the regular course of the Heller business (Tr. 116, 118).

Rosalind Heller, Mr. Heller's widow, worked in the betting commission office on some occasions (Tr. 133, 134). Sometimes she recorded bets for him (Tr. 134). Heller also conducted business at home (Tr. 134). Mrs. Heller identified U. S. Exhibit Nos. 2, 3, 4, 5, 6, 7 and 8 as business records kept in connection with his betting commission business in his hand writing (Tr. 134-138). She stated that " 'S.A.' means 'Artie Samish Account to James Arena' " in the Heller records (Tr. 142). U. S. Exhibit No. 3 was identified by her as a record for the week ending November 30, 1947 (Tr. 142). This record showed a plus balance of $34,000 (Tr. 143; U. S. Exhibit No. 3). U. S. Exhibit No. 5 contained a check stub to the "S.A." account dated December 3, 1947, for $6,050. U. S. Exhibit No. 8 was a check of Mr. Heller's, with the

same number as the check stub, for $6,050 dated December 3, 1947 (Tr. 143).

Earl Madieros, an Assistant Cashier with the Bank of America, testified that on December 4, 1947, $38,000 was paid on behalf of Tiny Heller (Tr. 159). The teller who made the payment of these checks was Herman Worth (Tr. 159). The payment was made for four checks, one in the amount of $6,050 (U. S. Exhibit No. 8) and three other checks in the amounts of $8,900, $9,350 and $13,700 (U. S. Exhibit No. 11). These checks were endorsed by Irving Baskin (Tr. 164). Payment was made during the noon hour (Tr. 164). At the conclusion of Madieros' testimony, a portion of the grand jury testimony was read into the record (Tr. 168, 169), in which appellant, when asked concerning five cards described as Sacramento Football Selections, dated October 26, 1946, declared that he knew nothing about these cards (Tr. 169). In this portion of the grand jury testimony Mr. Arena also denied that he placed any bets with Fred Whitted or that he placed the bets on October 26, 1946, which are represented by United States Exhibit No. 10.

The second count of the indictment charged that appellant won $2,000 on a bet placed with one Jack Roland. The court held that there was direct evidence from Mr. Roland's records that appellant had won such a bet but that, in the absence of corroborative evidence, appellant should be acquitted on that count of the indictment. Mr. Roland's testimony and U. S. Exhibit No. 14 were stricken and the jury instructed to disregard them (Tr. 178). The jury re-

turned a verdict of guilty as charged (Tr. 26). Appeal was then timely made to this Court from the judgment of conviction (Tr. 35).

STATUTES.

18 *United States Code,* Section 1621:

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both.

28 *United States Code,* Section 1732 (a):

(a) In any Court of the United States and in any Court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such

act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

QUESTIONS PRESENTED.

1. Was the evidence sufficient?

2. Were Tiny Heller's books properly admitted under Section 1732 of Title 28 as records kept in the ordinary course of business?

3. Was the indictment duplicitous?

4. Were the instructions proper?

SUMMARY OF ARGUMENT.

I. THE EVIDENCE WAS SUFFICIENT.

Appellant claims that the corroboration rule in perjury cases requires that the ultimate fact in issue, in this case the disposition of the money, be directly proved either by the testimony of another witness or by evidence which "of itself" proves guilt. Appellant admits that Baskin's other testimony was corroborated.

1. The Government Need Not Prove Its Case Twice.

Corroboration is required in perjury and rape cases and for the admissibility of a confession. This Court and the Supreme Court have indicated that the scope of the "corroboration" required is the same in all these cases. The corroboration need not "of itself" prove guilt. It must merely substantiate the testimony of the single witness who has testified directly that the defendant's oath was false. The government is not required to prove its case twice. The corroboration alone need not establish the guilt of the defendant beyond a reasonable doubt.

2. Corroboration May Be Established by Circumstantial Evidence.

Appellant declares that the *corroboration* may not be established by circumstantial evidence. The authorities are to the contrary. Requiring that the corroboration of Baskin's testimony be established by direct evidence is not requiring "corroboration" at all but is requiring two witnesses to testify to the same overt act. This requirement is the rule in treason cases. It is not a requirement of corroboration. This Court should not substitute the rule in treason cases for the rule which has previously obtained in cases of perjury.

3. The Corroboration Was Sufficient.

The corroborating evidence in this case was very strong. Baskin's testimony was corroborated in every detail except one. There was no direct testimony that Baskin handed the money to Arena besides his own. Requiring this testimony, however, would be

requiring the proof for treason cases not requiring corroboration of Baskin's testimony.

II. THE BUSINESS RECORDS OF TINY HELLER WERE ADMISSIBLE.

The business records of Tiny Heller were identified by three witnesses. Three witnesses testified that they were in Heller's handwriting. Three witnesses testified as to the manner in which these records were kept. Three witnesses testified that the records were kept in the regular course of business. Tiny Heller was dead at the time of the trial. Section 1732 of Title 28 provides for the admissibility of all records made in the regular course of business. These records were admitted pursuant to that section. A proper foundation was laid for these records' admissibility, and they would have been admissible even prior to the enactment of Section 1732. It has been universally held that persons familiar with business records may testify with respect to the abbreviations used therein.

III. THE INDICTMENT WAS NOT DUPLICITOUS.

All the particulars in which a defendant swears falsely at the time charged may be embraced in one count. In the present case the false testimony had to do not with different subjects or transactions but with one transaction and one subject matter—the payment of $38,000 to appellant on behalf of Artie Samish. The five different "offenses" claimed by

appellant relate in fact only to a single offense involving a multiplicity of ways and means. The single offense was swearing falsely to the grand jury with respect to the $38,000 transaction.

IV. THE TRIAL COURT'S INSTRUCTIONS WERE PROPER.

1. The Instructions on Corroboration Were Proper.

The Court's instructions on "corroboration" were in accord with the great weight of authority. Appellant's objections consist in a misconception of the requirement of corroboration for perjury cases. The law does not require that the corroboration be established either by direct evidence or prove the case beyond a reasonable doubt.

2. The Court Properly Refused to Give Appellant's Requested Instruction No. 12.

The Court's instruction on appellant's other false statements to the grand jury was proper. Appellant's complaint amounts to nothing more than a preference for his own language. The Court is free to use language of its own in charging a jury so long as the charge states the applicable law.

ARGUMENT.

I. THE EVIDENCE WAS SUFFICIENT.

Appellant's argument attacking the sufficiency of the evidence is based on the unique rule in perjury cases that the case must be proved by one witness plus

corroborative circumstances. This rule originated in the limitation of ancient common law that one oath could not prevail against another. *Wigmore, Third Edition,* Section 2040. Originally it was necessary in order to sustain a conviction for perjury that the falsity of the oath be proved by the sworn testimony of two or more witnesses. This rule was early modified so as to permit a conviction upon the sworn testimony of one witness if that testimony was supported by proof of "corroborative circumstances." *United States v. Palese,* 133 F. 2d 600, 602. See *Wigmore,* Section 2042. The rule has, however, been soundly criticized. In *State v. Storey,* 182 N.W. 613, 15 A.L.R. 629, the Court pointed out that it was inconsistent to hold that evidence sufficient to hang a man for murder was insufficient to convict him for perjury. *Wigmore* states, "The rule is in its nature now incongruous in our system." *Wigmore,* Section 2041. See also *Goins v. United States,* 99 F.2d 147, 149; *Marvel v. State,* 131 A. 317, 42 A.L.R. 1058.

Appellant admits that the government has satisfied the "one witness" requirement of the rule (App. Br., page 35). Appellant argues, however, that the corroboration of Irving Baskin's testimony was insufficient as a matter of law. After reviewing the evidence in the light more favorable to the *defendant,* appellant declares that the government did not corroborate the testimony of Baskin in that part of his testimony in which he stated "he accompanied appellant to the bank and there turned over 38 one thousand dollar bills to appellant." Appellant ad-

mits, however, that it could be inferred from the corroborative evidence that "Mr. Baskin presented the checks and received $38,000 in cash (App. Br., page 39)." He further admits that appellant laid bets with Mr. Heller over a period of years and there was a net win in favor of Samish on November 30, 1947 (App. Br., pages 41, 49). Appellant rests his case on the ground that the other testimony in the case was not corroborative of Baskin's testimony as to the "disposition" of the money (App. Br., page 49).

Appellant is in fact claiming that the corroboration rule in perjury cases requires that the ultimate fact in issue, in this case the disposition of the money, be directly proved either by the testimony of another witness (see App. Br., pages 66, 67) or by proof "inconsistent with the innocence of the accused—evidence which 'of itself' " proves guilt (App. Br., page 49).

1. The Government Need Not Prove Its Case Twice.

Appellant argues that the *corroboration* independently must prove the defendant guilty beyond a reasonable doubt. In effect appellant argues that the government must prove its case twice. In this connection he cites *United States v. Neff,* 212 F.2d 297. In that case the Court held that the corroborative evidence must be "evidence aliunde—evidence which tends to show the perjury independently." It should be noted that the Court used the words "tends to show." The Court further stated as the test of whether or not the corroborative evidence was suffi-

cient is whether "the evidence, if true, substantiates the testimony of a single witness who has sworn to the falsity of the alleged perjurious statements." *United States v. Neff,* supra, at page 306. This case does not stand for the proposition advanced by appellant that the corroborative evidence must "of itself" prove guilt. This Court in the case of *Pearlman v. United States* (9th Cir.), 10 F.2d 460, 462, has held that evidence aliunde "need not be such as to alone establish the fact beyond a reasonable doubt."

There are two cases other than perjury where corroboration is required. A confession must be corroborated, and in rape cases the testimony of the prosecutrix must be corroborated. The Supreme Court, in the case of *Warszower v. United States,* 312 U.S. 342, held that the corroboration necessary to admit a confession of the defendant is the same as required in a perjury case.

This Court has long held that the independent evidence required to corroborate a confession need not alone establish the crime beyond a reasonable doubt. It is sufficient if, when considered in *conjunction with a confession,* "it satisfies the jury beyond a reasonable doubt that the offense was in fact committed, and the plaintiff . . . committed it." (Emphasis added.) *Pearlman v. United States,* supra, at page 462.[1] See also *D'Aquino v. United States* (9th Cir.), 192 F.2d

[1]This case was recently approved by the Supreme Court in the cases of *Smith v. United States,* 348 U.S. 147, 156, and *Opper v. United States,* 348 U.S. 84, 92.

338, 357; *Wiggins v. United States* (9th Cir.), 64 F.2d 950, cert. den.; *Davena v. United States* (9th Cir.), 198 F.2d 230.

The "corroboration" in rape cases also need not independently establish the commission of the crime beyond a reasonable doubt. *Miller v. United States,* 207 F.2d 33, 35; *Ewing v. United States,* 135 F.2d 633; *McGuinn v. United States,* 191 F.2d 477, 478.

This Court has treated corroboration in perjury cases analogously to that required in the other cases where corroboration is necessary. See *Vetterli v. United States,* infra, at 293, where the court commented that the corroborative evidence need not of itself establish guilt beyond a reasonable doubt. It is only corroboration that is required, not the two witnesses which the Constitution requires in treason cases. Corroboration in perjury cases must fortify and substantiate the testimony of the one witness who testifies directly to the falseness of the oath. The cases have never required that the corroboration must "of itself" prove the offense charged.

In *United States v. Hiss,* 185 F.2d 822, the alleged perjury was that the defendant falsely swore he had not turned over copies of State Department documents to Whittaker Chambers or any other unauthorized person. Mr. Chambers testified that Hiss gave him the documents. The Court found there was sufficient corroboration in the proof that the State documents had been available to Hiss, and that the copies had been made on his typewriter.

In *United States v. Henderson,* 185 F.2d 189, the perjury was with reference to the interstate transportation of a woman for immoral purposes. The Court held that proof that the defendant registered at a hotel with the woman was sufficient corroboration of the woman's testimony that the defendant had transported her.

In *Miranda v. United States* (9th Cir.), 196 F.2d 408, where the issue was whether the defendant had in fact made the alleged perjurious statement, this Court held that the testimony of "one witness" was sufficiently corroborated by a notation made by that very witness.

As this Court said in *Vetterli v. United States* (9th Cir.), 198 F.2d 291, 293, "The rule of proof required in perjury cases prescribes that the uncorroborated testimony of one witness is insufficient; it does not . . . 'relate to the kind or amount of other evidence required. . . .' In the event the corroborative evidence 'substantiates' the testimony of the single witness it is sufficient." See also *Hammer v. United States,* 271 U.S. 620, 627; *Hashagen v. United States,* 169 Fed. 396; *Hart v. United States* (9th Cir.), 131 F.2d 59.

2. Corroboration May Be Established by Circumstantial Evidence.

It is appellant's position that "corroboration" may not be established by circumstantial evidence. In his opinion only direct testimony that Baskin transferred the money to him in addition to Baskin's testimony

that the money was so transferred would be sufficient to establish the charge. There is no method by which this could be established "directly" without another witness testifying to the same transaction as Baskin. In brief, appellant is asking that the Court establish the same requirements in the perjury case as is required in a prosecution for treason. Appellant is asking that two witnesses testify to the same overt act. This is not the rule in perjury cases. As stated in *Wigmore,* Section 2042, perjury is vitally distinguishable from treason in the feature that "a single witness suffices if corroborated."

Appellant cites *Radomsky v. United States* (9th Cir.), 180 F.2d 781, for his authority that circumstantial evidence does not suffice. But this case does not bear on the question of whether or not the *corroboration* must be direct. It merely refers to the testimony of the "one witness." The same is true in *McWhorter v. United States,* 193 F.2d 982. That case merely held that a contradictory statement by the defendant is not sufficient evidence of perjury where the "one witness" merely testified that the defendant made the contradicting statement.

In the early case of *United States v. Hall,* 44 Fed. 864, the Court said, "It is now well settled that such a conviction [for perjury] may be had on the evidence of one witness supported by proof of corroborating *circumstances.*" (Emphasis ours.) This Court stated the same rule in *Catrino v. United States* (9th Cir.), 176 F.2d 884, declaring that one witness

plus corroborating circumstances was sufficient. To the same effect see *United States v. Remington,* 191 F.2d 246. Even in the Third Circuit the rule, since *United States v. Palese,* supra, has been that only corroborative *circumstances* are necessary.[2] The substitution of the word "evidence" for the word "circumstances" in the *Neff* case (page 306) is not sufficient grounds for requiring this Court to substitute the rule in treason cases for that which has in the past obtained in cases of perjury.

It is not even clear that perjury may not be established by circumstantial evidence alone. To be sure, this Court in the *Radomsky* case, supra, acted as if some direct evidence was required but it did so on the grounds that "No contention is here made that such is not the law as applied to perjury in the federal courts." There is state authority to the contrary. *Marvel v. State,* supra. Federal cases have held that in some circumstances perjury may be proved by circumstantial evidence alone. *Fotie v. United States,* 137 F.2d 831.

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[2]The language of *United States v. Rose,* 215 F.2d 617, and *United States v. Neff,* supra, is somewhat contrary to the rule established in the leading cases on the subject in the Third Circuit. *United States v. Palese,* supra; *United States v. Seavey,* 180 F.2d 837. The *Rose* case, however, merely held that the statement upon which the perjury charge was based was equivocal and that, as a matter of law, there was a reasonable doubt despite the jury verdict of the guilt of the defendant. The *Neff* case held what seems incorrect as a matter of sound reasoning: that one could not infer that a person had ever attended a Communist meeting from the fact that he was a member of the Communist party or that this fact did not corroborate the testimony of a witness that the defendant had in fact attended such a meeting.

The necessary corroboration in rape cases can be supplied by circumstantial evidence. See *Ewing v. United States,* supra, where the Court said "But to safeguard the defendant by requiring corroboration . . . is one thing. To throw around him a wall of immunity requiring the testimony of an eye witness or 'direct evidence,' which is more than circumstantial . . . is another." *Ewing v. United States,* supra, at pages 635, 636. See also *McGuinn v. United States,* supra, at page 478.

The present case illustrates the danger of a rule requiring more than one witness directly establishing the falseness of the defendant's oath. Tiny Heller was dead as was also the teller, Herman Worth, the lack of whose testimony appellant argues should be construed against the government (Tr. 187). The only living eye witness to the transaction itself was Irving Baskin. The corroboration, therefore, could only have been established by circumstances. Perjury can be committed in circumstances which would not allow more than one witness to be aware of its falsity. Must the Court decide that perjury may not be established where the circumstances of the case allow but one witness to have direct knowledge of the facts? No reason in policy or in authority has been advanced to require this Court to come to this conclusion.

3. The Corroboration Was Sufficient.

The corroborating evidence in this case was very strong. It quite probably was enough to establish

the falseness of the appellant's oath by itself. Arena had testified before the grand jury that he had made bets with Tiny Heller but that they were very small ones—twenty or thirty dollars (Tr. 70, 71). He claimed that he had never won more than a hundred dollars (Tr. 72). He said that he had never received a dollar or $38,000 on behalf of Artie Samish or anyone else (Tr. 74). The subject of the indictment for perjury in this case was appellant's sworn testimony that he had not accepted $38,000 from Irving Baskin on behalf of Samish (Tr. 73).

Whitted, an employee of Tiny Heller from 1941 to 1947 (Tr. 100), testified that Arena had regularly placed bets with Heller since 1941 (Tr. 104). From 1941 to about 1946 Arena's bets were small (Tr. 105), but in 1947 and 1948 the bets ranged from $100 to two or three thousand dollars (Tr. 105). Whitted testified that Samish, in early years, had placed bets himself (Tr. 102), but later he placed no bets for himself, and appellant placed all bets on Samish's behalf (Tr. 120, 121). The bets, according to Mr. Whitted, were recorded as "A.S." when Samish placed the bets himself (Tr. 120-122), but when Arena placed the bets for Samish, the initials used to record the bets were "S.A." (Tr. 121).

Whitted further testified that from the year 1945 all settlement of Samish's bets were made with appellant (Tr. 125). He identified United States Exhibit No. 3 as part of Mr. Heller's records (Tr. 118). United States Exhibit No. 3 shows that on the week ending November 30, 1947, there was a plus balance

in the account of "S.A." of $34,800.[3] Mrs. Heller, who had worked for her husband (Tr. 134), identified United States Exhibit No. 5. Exhibit No. 5 contained a check stub dated December 3, 1947, covering a check to the "S.A." account for $6,050. Mrs. Heller testified that the stub notation meant " 'Artie Samish Account to James Arena' " (Tr. 142).

The bank clerk testified that on December 4, 1947, four checks were cashed by Irving Baskin amounting in total to $38,000 (Tr. 160). United States Exhibit No. 11, which was identified by the bank clerk, was a check drawn by Mr. Heller on December 3, 1947, for $6,050. Both the check stub (U. S. Exhibit No. 5) and the check (U. S. Exhibit No. 11) bore the same number. The jury was entitled to infer that the check stub for this check was United States Exhibit No. 5 which reflected the check was paid to James Arena on behalf of the "S.A." account. Three other checks were cashed that day with T. Heller as payee. The total of the checks Baskin cashed was $38,000 (U. S. Exhibit No. 11).

Whitted testified that he recorded a bet made by Arena on behalf of Samish on October 26, 1946 (Tr. 109). U. S. Exhibit Nos. 4, 6, 2-1 and 10 established that this bet was paid to the "S.A." or Samish-Arena account by check on October 28, 1946. Heller's records established that another bet was paid by Heller on behalf of the "S.A." or Samish-Arena account to James Arena on October 30, 1946 (U. S.

[3]U. S. Exhibit No. 3 was admitted for all purposes (Tr. 141) as appellant apparently admits at page 60 of his brief.

Exhibit Nos. 2-2, 4; Tr. 138, 141). This win was paid by a check for $6,150 (U. S. Exhibit No. 7). Appellant admits that U. S. Exhibit No. 9, in conjunction with Whitted's testimony establishes that appellant made a bet at the Tiny Heller establishment which resulted in a win of $2,000 (App. Br., p. 44; Tr. 114, 115; U. S. Exhibit No. 9). Arena testified falsely to the grand jury when he stated that he had never won more than one hundred dollars in bets with Tiny Heller. Whitted's testimony established that appellant testified falsely before the grand jury when he denied any knowledge of the October 26, 1946, gambling transaction which resulted in a payment to the Samish-Arena account of $11,950. The fact that he testified falsely in other respects on the same occasion on which he was accused of testifying falsely went to show his intent in making the statement contained in the indictment, and tended to negate any question of mistake or inadvertence.

Mr. Heller was dead. He could not testify as to the transactions of December 3 and 4. His records, however, were available and they established that Artie Samish had made a large win for the week ending November 30, 1947. The "S.A." account both Whitted and Mrs. Heller testified was Arena on behalf of Samish.

Appellant has discussed the exhibits in this case. He has refused, however, to make any inferences from those exhibits. He has not connected the exhibits with the testimonies which interpreted them. The records support and corroborate Mr. Baskin's story

that he received some $38,000 from the bank in connection with a large gambling win by the "S.A." or Samish-Arena account. Mr. Arena swore that he had never received $1 or $38,000 on behalf of Samish. The evidence, wholly apart from Baskin's direct testimony, showed that he acted as a runner for Samish and that bets were placed over a series of years by Tiny Heller under a "S.A." or Samish-Arena account. The uncontradicted evidence showed that that account had a $34,000 win prior to December 4. Mr. Heller's check stub indicated that part of that win was paid by Heller's personal check. The proceeds of that check and other checks amounting in total to approximately the amount listed in Exhibit No. 3 as the Samish-Arena winnings for the last week of November, were given to Irving Baskin by the bank on the date and time he testified.

Baskin's testimony was corroborated in every detail except one. There was no direct testimony that Baskin handed the money to Arena besides his own. But requiring that testimony would not be requiring corroboration of Baskin's testimony but would be requiring two witnesses to testify to the same overt act. This requirement is the rule in treason cases. It is not a requirement of *corroboration*. Corroboration in cases involving confessions, in rape and in perjury means only that the witness's testimony does not stand alone; that it is fortified and substantiated by other testimony which indicates that the witness has testified truthfully or that the confession is in accord-

ance with the facts. See *Weiler v. United States,* 323 U.S. 606.

The testimony in this case, apart from Baskin's testimony, is sufficient to establish "of itself" that appellant swore falsely, but we do not believe that the law requires this degree of proof. We respectfully submit that a jury could find that the corroborative evidence plus Mr. Baskin's testimony establishes the guilt of appellant beyond a reasonable doubt.

II. THE BUSINESS RECORDS OF TINY HELLER WERE ADMISSIBLE.

Appellant complains of the admission in evidence of Exhibits 2, 3, 4, 5, 6, 7 and 8 and the testimony of the witnesses Rosalind Heller and F. W. Whitted relating thereto. These exhibits were identified as business records of Tiny Heller (Tr. 83-87, 113-120, 135-140). Irving Baskin, F. W. Whitted and Mrs. Heller all testified to the manner in which these books were kept. They also testified that the records were in the handwriting of Mr. Heller (Tr. 83-87, 113-120, 135-140). At the time of the trial Mr. Heller was deceased (Tr. 133).

F. W. Whitted and Mrs. Heller all worked at Heller's betting establishment (Tr. 79, 100, 134). F. W. Whitted recorded bets made by James Arena on behalf of Artie Samish and recorded those bets in Mr. Heller's records under the designation "S.A." (Tr. 120-121). Mrs. Heller also testified that " 'S.A.' " in

Mr. Heller's books "means Artie Samish Account to James Arena." (Tr. 142). All bets received by Tiny Heller were recorded on the type of record represented by U. S. Exhibit No. 3 (Tr. 118).

Section 1732 of Title 28 provides for the admissibility of all records made in the regular course of business. All other circumstances of the making of the record may be shown to affect its weight "but such circumstances shall not affect its admissibility." The purpose and effect of this statute is to make admissible any writing if made in the regular course of any business without the strict proof of authenticity which had theretofore been required. *Harper v. United States,* 143 F.2d 795.

It is not required that the person testifying in respect to the records have personal knowledge of their contents. *Wheeler v. United States,* 211 F.2d 19, 23. Even before the enactment of Section 1732 business records were admissible if made by persons having knowledge of the facts by "proof of their handwriting, if dead, insane, or beyond the reach of process." *Levey v. United States* (9th Cir.), 92 F.2d 688; *Wilkes v. United States* (9th Cir.), 80 F.2d 285, 290. When the admissibility of the record is in issue, whether the authentication of the record is sufficient is in the discretion of the Court. *Lewis v. United States* (9th Cir.), 38 F.2d 406. It has been universally held that persons familiar with the record may testify as to the meaning of abbreviations used in it. See *Meyer v. Everett Pulp & Paper Co.* (9th Cir.), 193 Fed. 857, and cases collected in 100 A.L.R. 1465.

Appellant complains that there was not sufficient foundation for the admission of the Heller records (App. Br., p. 60). We fail to see how any better foundation could have been laid without the testimony of Mr. Heller himself. Mr. Heller's handwriting was proved by three witnesses. Three witnesses testified that Heller recorded bets in the manner shown by the exhibits. Two witnesses testified that they had observed bets recorded for the Samish-Arena account in the manner recorded in United States Exhibit No. 3. Counsel for appellant objected at the trial to testimony concerning these exhibits on the ground that the witnesses were not personally familiar with the specific transactions reflected on the exhibits (Tr. 118, 142). It is this very objection which Section 1732 was designed to invalidate. The lack of personal knowledge of the transactions involved in the instant case on the part of the witnesses testifying with respect to the Heller records could be shown to affect the weight of the testimony. The weight of the testimony is not the question here.

III. THE INDICTMENT WAS NOT DUPLICITOUS.

It has been universally held that *all* the particulars in which the defendant swore falsely at the time charged may be embraced in one count and proof of the falsity of any one will sustain the count. 2 *Wharton's Criminal Law,* Sections 1567, 1582. When a defendant swears falsely before a grand jury on many occasions the falsity extends to a number of transactions relating to the grand jury's investigation. In

United States v. Harris, 311 U.S. 292, in an appeal from an order of the District Court quashing an indictment for perjury, the Supreme Court reversed the District Court and upheld the validity of an indictment that charged in one count that the defendant had sworn falsely when she denied (1) that she had gone to Ray Born in 1932 and talked to him, (2) that she had spoken to Lou Kissel and (3) that she paid money to the said James McCullough. The charge in the *Harris* case related to one proceeding in which the defendant swore falsely with respect to several different particulars. The crime in a perjury case is swearing falsely. The subject matter of the false testimony may relate to several different transactions. The falsity with respect to these several transactions, however, taken together constitute one crime, that of swearing falsely before the grand jury. See *United States v. Goldstein,* 168 F.2d 666.

The present case, however, does not involve false swearing with respect to several different transactions. The indictment set forth in haec verba the testimony of appellant which related to his acceptance of $38,000 from Irving Baskin on behalf of Artie Samish. The "five different offenses" set forth by appellant at page 30 of his brief relate only to that transaction. The questions are phrased in different ways but they have but one object. That object was the truth concerning the transaction in which appellant received $38,000 as gambling winnings from Irving Baskin. The grand jury did not obtain the truth but obtained falsity expressed in five different ways.

Appellant quotes a dictum from *Seymour v. United States,* 77 F.2d 577, indicating that the indictment there, if the charges had been joined in one count, *might* have been duplicitous. In that case, however, the different counts of the indictment related to *different matters* to which the defendant swore falsely at the hearing.

In the present case the indictment had to do not with different subjects or transactions but with one transaction and one subject matter—the payment of $38,000 to appellant on behalf of Artie Samish. *United States v. Orman,* 207 F.2d 148, cited by appellant, was a contempt case but the Court held (at page 160) that where separate questions seek to establish but a single fact or related to but a single inquiry, only one penalty for contempt may be imposed. The *Orman* case, far from upholding appellant's position that the indictment here is duplicitous, holds that falsity with respect to a "single inquiry" gives rise to but one crime. *United States v. Coen,* 72 F. Supp. 10, expressly held that it was proper to charge in a single count the commission of the crime of perjury by including other assignments of falsity with respect to the same transaction. What appellant calls "five different offenses" were in fact but a single offense involving a multiplicity of ways and means of doing one thing—testifying falsely with respect to the $38,000 transaction. A series of acts constituting but one offense, even though involving a multiplicity of means, may be charged in one count. *Greenbaum v. United States* (9th Cir.), 80 F.2d 113;

Hovley v. United States (9th Cir.), 277 Fed. 788; *United States v. Crummer,* 151 F.2d 958.

IV. THE TRIAL COURT'S INSTRUCTIONS WERE PROPER.

1. The Instructions on Corroboration Were Proper.

The Court instructed the jury that corroboration was required in the following language:

> "In order to sustain a conviction for perjury there must be direct and positive evidence of the falsity of the statement made under oath. The falsity of the statement made under oath must be proved by clear and convincing evidence. The uncorroborated testimony of one witness is not enough to establish the falsity of the testimony of the defendant. The falsity must be evidence by the testimony of two independent witnesses, or by one witness and corroborating evidence. In the absence of such proof the defendant must be acquitted."

This instruction has been approved innumerable times. *United States v. Palese,* supra; *United States v. Goldstein,* supra; *Hashagen v. United States,* supra; *United States v. Hall,* supra; *United States v. Seavey,* supra; *Catrino v. United States,* supra.

Appellant, in his Specifications of Error No. 8 and No. 10, apparently desired that the Court instruct that circumstantial evidence could not supply the corroboration required by the rule. We have discussed this matter in connection with our argument on the sufficiency of the evidence. As we said there, the effect of such a construction of the law would be

to substitute the rule in treason cases for the rule which has previously obtained in perjury. Requiring "direct evidence" would not be a corroboration requirement at all. In every case it would be necessary to have two witnesses testify to the same overt act.

In his Specifications of Error No. 9 and No. 12 appellant repeats his argument with respect to the sufficiency of the evidence. He claims that the corroboration must "of itself" establish the falsity of appellant's statements. The Court instructed as follows:

> "By corroborative evidence is meant evidence independent of the testimony of a single witness under oath which substantiates the testimony of that witness. That evidence must be trustworthy. A document such as a bank record or check or business record may constitute corroboration, if you find that it substantiates the testimony of the witness who testified directly as to the falsity of the defendant's statement and is trustworthy.
>
> The trustworthiness of the corroborative evidence is for you to determine."

The Court declared there must be evidence "independent of the testimony of a single witness which substantiates the testimony of that witness." The Supreme Court in *Weiler v. United States,* supra, held that corroborative evidence was sufficient if it "substantiates the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement." We repeat our contention made in discussing the sufficiency of the evidence. The govern-

ment need not prove its case twice. The jury should not be instructed that the corroborative evidence must of itself establish the guilt of the defendant beyond a reasonable doubt. Judge Murphy instructed that the corroborative evidence must be independent of the testimony of the one witness who has sworn to the falsity of the statement. He should not do more than that. More than that would require the government to prove the defendant's guilt beyond a reasonable doubt by the corroborative evidence alone. This is not requiring corroboration. This is setting a standard of proof required in ~~ordinary~~ TREASON cases.

2. The Court Properly Refused to Give Appellant's Requested Instruction No. 12.

The Court's instruction on other false statements adequately covered the matters urged by appellant in Instruction No. 12. There was in the case evidence that appellant had lied to the grand jury regarding his own bets and other bets of Samish in the Heller establishment. Appellant, as a matter of fact, urges in Specification of Error No. 5 that the admission of this evidence was error. The very instruction offered by appellant, however, demonstrates the admissibility of this evidence. This evidence went to show appellant's intent in making the false statement charged in the indictment. The Court's instruction properly limited the jury's consideration of these false statements to the question of appellant's intent. The instruction was a proper statement of the law. *Miranda v. United States,* supra.

Appellant in his brief declares that the instruction given "did not go far enough." He does not demonstrate how the requested instruction went any further. In order that a case be reversed, a defendant must complain of something more important than a preference for his own language. Appellant does not show how he was prejudiced by the instruction or, in fact, how the instructions differed. In our opinion the instructions are two different ways of saying the same thing. A Court is free to use language of its own in charging the jury so long as the charge states the applicable law. *Mitchell v. United States* (9th Cir.), 213 F.2d 951.

CONCLUSION.

We respectfully submit that the evidence was sufficient and that appellant received a fair trial. The judgment of conviction should be affirmed.

Dated, San Francisco, California,
May 4, 1955.

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